TESTIMONY
OF
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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

BEFORE THE
SURFACE TRANSPORTATION AND MERCHANT MARINE SUBCOMMITTEE
OF THE
COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE
UNITED STATES SENATE

ON

REAUTHORIZATION OF SURFACE TRANSPORTATION BOARD

MARCH 2, 1999

Madam Chairman and Senators, my name is Edward Emmett and I am pleased to appear today as president of The National Industrial Transportation League, the nation's oldest and largest organization representing shippers of all commodities, using all modes of transportation in both domestic and international commerce.

It is entirely fitting that the League appear today to discuss the future of the Surface Transportation Board and its role in regulating this nation's railroads. The League was formed in 1907 specifically to represent shippers before the relatively new Interstate Commerce Commission. At that time, of course, there were no motor carriers, so railroads were the dominant means of freight transportation. The ICC had been formed to protect shippers from abuse of market power by the railroads. While much has changed since 1907, if you are a shipper who must rely on the service of a single railroad, you still need protection from abuse. The question before policy makers is still, "what is the best approach for providing such protection for shippers?"

Before reauthorizing the Surface Transportation Board for any extended period, I believe a case must first be made for its continuation in its present form. When I was confirmed as an ICC commissioner in 1989, I arrived with a firm belief in deregulation. Nothing in the intervening ten years has shaken that belief. In fact, my seven years at the League have given me daily examples of the benefits of deregulation of freight transportation.

Belief in economic deregulation has been the hallmark of U.S. transportation policy since the late 1970s. When Congress created the Surface Transportation Board in 1996 to replace the Interstate Commerce Commission, it recognized that the motor carrier industry needed no economic regulatory oversight because free market forces provided consumers with adequate protection. However, the railroad regulatory provisions of the Staggers Act remained in place because it was widely understood that railroads are different from other transportation modes. Unfortunately, the STB's administration of the provisions of the Staggers Act has created the impression among many shippers that the agency views its role more as the protector of the railroads' franchises than as the insurer of competition in the railroad industry.

This is not a new perception on the part of shippers. To prepare for my testimony today I read much of the testimony from a March 13, 1986 House of Representatives hearing on the Staggers Act. In 1986, many rail shippers were seeking changes to the Staggers Act. Many others, though, were very pleased with the six-year old law and wanted no changes. The League, at that time, concluded its testimony by stating, "The League believes that the Staggers Rail Act. . . . has worked well in those situations where competition, especially rail-to-rail competition, exists. However, it has been less successful in those instances where effective competition is absent. We believe that this dichotomy is due, in large part, to the Commission's interpretation and administration of the Act, specifically, its failure to give adequate emphasis to the 1980 reform law's goal of maintaining and fostering competition in this industry." That year, the League was actively promoting private sector agreements as a better approach than new legislation.

Here we are 13 years later, and despite a lot of rhetoric about a deregulated rail industry, sole-served rail shippers still have no choices in many instances. If such a shipper is not satisfied with their rail service, there is still no way to solicit competition from another railroad. That is still the crux of the debate before you today. A truly deregulated industry features active competition. The railroad industry is still not a truly deregulated industry. I believe the very nature of the U.S. railroads prevent it from ever being deregulated in the classic sense.

A couple of things have changed since 1986. The ICC has been replaced by the STB. The bigger change, though, has come in the railroad industry itself. Through merger after merger, the industry has been consolidated to an extent that few could have predicted. Perhaps the most telling testimony from 1986, however, is just such a prediction. A spokesman for a group called " Railroads Against Monopoly" warned that the big railroads would concentrate their market power at the expense of regional railroads. In 1999, we will witness the reduction of U.S. major railroad systems to five. When the Staggers Act was passed there were more than 40 class I railroads. If nothing else, concentration of the industry should mandate a reexamination of an almost 20-year old statute. Added to the continuing chorus of concern from rail shippers, this radical change in the railroad industry argues for a measured approach to the future of the STB. Now is not the time to pass a long-term reauthorization to preserve the status quo at an agency facing so many questions.

There has been a fair amount of public discussion that rail shippers do not agree on what they want. There is some truth to that, but there is far more consensus than an outside observer might suspect. I am here to speak only for The National Industrial Transportation League, but I believe our specific areas of concern are remarkably consistent with those of other shipper organizations.

In recent months, the League staff has conducted two surveys of our members who use rail transportation. The first survey was conducted to try to get a sense of the relative satisfaction or dissatisfaction of League members with the current state of railroad regulation. Eighty percent of the respondents said that STB regulatory policy was inadequately addressing the needs of shippers. Of those who expressed dissatisfaction with the current system, 91 percent thought that the STB could not improve the situation without legislative change. When asked whether such change should strengthen the STB or provide for increased access to competing railroads, 82 percent of League members wanted more "access." Only 18% expressed a desire for a stronger regulatory agency. Just as in 1986, League members are seeking relief, but overwhelmingly remain opposed to "reregulation."

A follow-up survey of League members was then done to determine exactly what type of legislation is needed to provide adequate protection to rail shippers. Eight suggested legislative changes were presented along with a ninth option of maintaining the current system. Two of the proposed legislative changes were favored by a large number and represent a clear consensus of League members. Those two proposals are to reverse the "bottleneck" decision and to change the terminal access rules.

The STB has ruled that, when a carrier serves both the origin and destination, it can legally foreclose another carrier from offering service over a portion of the route, by refusing to offer a rate from the point of competitive interchange over the bottleneck portion of the route. Congress should restore to shippers the right to competitive rail routing through existing interchanges to encourage rates produced by the competitive market, and should require the provision of reasonable rates in a timely manner over rail bottlenecks.

Put simply, this remedy would eliminate monopolistic pricing and would no doubt provide an incentive for innovation on the part of the railroads.

As a partial counterweight to the reduction in regulation by the Staggers Act, Congress decided that there should be a broadening of competitive access remedies, and provided for a new remedy and standards for competitive switching arrangements. However, Congress left it to the STB's discretion how to implement the provision. But the STB's rule on terminal access establishes almost insuperable standards for the granting relief.

Shippers have lost every case under these rules. The decisions require that a shipper seeking

relief has to present evidence on: (1) likely or actual antitrust-type competitive abuse, such as market foreclosure, price squeezes, refusal to deal, or monopolization or predation; (2) market dominance; (3) rate unreasonableness, including an inquiry into the carrier's costs; however, even rates above "stand-alone costs" are not a sufficient basis for competitive trackage rights; (4) the nature of the carrier's operations in the area to establish that there is a "terminal area"; and/or (5) severe service failures coupled with a showing that the operations of the carrier against whom relief is sought will not be impaired. These requirements, and particularly the "competitive abuse" requirement, are simply impossible to meet.

Congress should provide increased rights to competition through reciprocal switching and terminal trackage rights, affirmatively requiring the grant of these rights for shippers within a certain distance of existing interchanges/intersections (the Canadian system specifies a radius of 30 km) in order to promote rail-to-rail competition. At the very least, the agency's "competitive abuse" requirement, which appears nowhere in the statute, should be legislatively reversed.

These two changes received almost unanimous support. Other proposals that were heavily supported included elimination of the revenue adequacy determination for railroads, general improvement of the regulatory process, and the elimination of railroads' antitrust immunity.

In numerous transportation policy issues, the League has consistently recognized the need for give and take among shippers and carriers and other interested parties. During the past few years, that approach has yielded positive results, including an end to the motor carrier undercharge fiasco and passage of the Ocean Shipping Reform Act. We view railroad regulatory reform as a very difficult issue, but one which can be solved. As has been reported, the League is discussing the entire range of rail issues directly with the railroads through the auspices of the Association of American Railroads. Whether or not accommodation can be reached remains to be seen, but both sides are trying.

In conclusion, given the widespread concern among rail shippers, we were dismayed by the proposal to reauthorize the STB for four years without any attempt to address shippers' concerns. To do so would be to tell a broad cross-section of American industry that they do not even know anything about the economics of their own businesses. It would also be saying that the STB has perfectly implemented the Staggers Act. Surely, that is not the intent of the Senate.

On behalf of the League and its members, I urge you to reauthorize the STB for no more than two years and include some provisions to assure rail-to-rail competition. Absent a clear declaration for change, at least establish a mechanism to review the issues which have been raised. Perhaps the creation of a study commission is in order now that the Staggers Act is almost twenty years old and the railroad industry, as well as its major competition, the trucking industry, is fundamentally different than when the Act was passed.

As I mentioned at the beginning of my testimony, railroad regulatory issues were the reason shippers organized the League. That reason is still a major focus of ours and we hope to have continuing opportunity to work with you in addressing the concerns of rail shippers.

I look forward to your questions.